

Flemming Zulack Williamson Zauderer LLP

One Liberty Plaza

New York, New York 10006

Telephone: (212) 412-9550

Facsimile: (212) 964-9200

Attorneys for Defendant Banque Privée Espirito Santo S.A.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

BANQUE PRIVÉE ESPIRITO SANTO S.A.,
f/k/a Compagnie Bancaire Espirito Santo S.A.,

Defendant.

Adv. Pro. No. 11-02571 (SMB)

**SUPPLEMENTAL REPLY MEMORANDUM OF LAW OF BANQUE PRIVÉE
ESPIRITO SANTO S.A. IN FURTHER SUPPORT OF ITS MOTION TO DISMISS
BASED ON EXTRATERRITORIALITY AND IN OPPOSITION TO THE TRUSTEE'S
MOTION FOR LEAVE TO AMEND HIS COMPLAINT**

Defendant Banque Privée Espírito Santo S.A. (“Espírito Santo”) respectfully submits this supplemental reply memorandum of law in further support of Espírito Santo’s motion to dismiss based on extraterritoriality and in opposition to the Trustee’s motion for leave to amend his complaint. Espírito Santo also adopts and incorporates in full the arguments and grounds supporting dismissal without leave to amend set forth in the Consolidated Supplemental Reply,¹ in particular the arguments and grounds relating to the 9 checked boxes for Espírito Santo in the so-called “United States Connections Summary Chart” (the “Chart”) attached as Exhibit 2 to the Trustee’s Main Memorandum.²

For the reasons shown in the Consolidated Supplemental Reply and below, (1) the Trustee’s Complaint against Espírito Santo filed on September 1, 2011 (the “Complaint”) must be dismissed because it contains no allegations that the alleged subsequent transfers from Fairfield Sentry Limited (“Fairfield Sentry”) to Espírito Santo at issue in the Complaint occurred in the United States and (2) the Trustee’s motion for leave to amend should be denied on the ground of futility because the Espírito Santo Proffer³ submitted by the Trustee in response to the motion likewise fails to satisfy the Trustee’s burden of pleading facts giving rise to a plausible inference that any alleged subsequent transfers from Fairfield Sentry or Fairfield Sigma Limited (“Fairfield Sigma”) occurred in the United States.

¹ The term “Consolidated Supplemental Reply” refers to the Reply Consolidated Supplemental Memorandum of Law in Support of Transferee Defendants’ Motion to Dismiss Based on Extraterritoriality filed on September 30, 2015.

² The term “Trustee’s Main Memorandum” refers to the Trustee’s Memorandum of Law in Opposition to the Transferee Defendants’ Motion to Dismiss Based on Extraterritoriality and in Further Support of Trustee’s Motion for Leave to Amend Complaints filed in the consolidated docket on June 26, 2015.

³ The term “Espírito Santo Proffer” refers to the Trustee’s Proffered Allegations Pertaining to the Extraterritoriality Issue As to Banque Privée Espírito Santo S.A filed on June 29, 2015.

**THE COMPLAINT MUST BE DISMISSED UNDER
THE EXTRATERRITORIALITY DECISION**

On July 7, 2014, Judge Rakoff entered an Opinion and Order in which he decided the consolidated motion to dismiss of the Transferee Defendants (including Espírito Santo) based on extraterritoriality. *Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y.2014) (the “Extraterritoriality Decision”). Judge Rakoff held:

[I]t is the Trustee’s obligation to allege “facts giving rise to the plausible inference that” the transfer occurred “within the United States.” (citation omitted) *Here, to the extent that the Trustee's complaints allege that both the transferor and the transferee reside outside of the United States, there is no plausible inference that the transfer occurred domestically.* Therefore, unless the Trustee can put forth specific facts suggesting a domestic transfer, his recovery actions seeking foreign transfers should be dismissed.

Id. at 232 n.4 (emphasis supplied). Judge Rakoff then remanded the adversary proceedings against Espírito Santo and the other Transferee Defendants to this Court “for further proceedings consistent with this Opinion and Order.” *Id.* at 232.

In his Complaint against Espírito Santo, the Trustee seeks to recover subsequent transfers in the amount of \$11,426,745 that Espírito Santo allegedly received from Fairfield Sentry. Complaint, ¶ 2. The Complaint alleges that Fairfield Sentry—the purported transferor—is “a BVI company” that is “currently in liquidation in the British Virgin Islands.” Complaint, ¶ 2. With respect to Espírito Santo—the purported transferee—the Trustee alleges that it “is a Swiss limited company located at Avenue Général-Guisan 70 A, 1009 Pully, Switzerland.” Complaint, ¶ 21.

The Trustee’s Supplemental Memorandum⁴ does not even attempt to show that the existing Complaint contains sufficient allegations to give rise to a plausible inference that the

⁴ The “Trustee’s Supplemental Memorandum” refers to the Trustee’s Supplemental Memorandum of Law in Opposition to Banque Privée Espírito Santo S.A.’s Motion to Dismiss Based on Extraterritoriality and in Further Support of the Trustee’s Motion for Leave to Amend the Complaint, filed on June 29, 2015.

alleged transfers from Fairfield Sentry at issue in the Complaint occurred in the United States.

Therefore, the Complaint should be dismissed under the Extraterritoriality Decision.

**THE TRUSTEE’S MOTION FOR LEAVE TO AMEND SHOULD BE
DENIED ON THE GROUND OF FUTILITY**

The Trustee should not be permitted to amend because the proposed amendments, as set forth in the *Espírito Santo Proffer*, would be futile. The only allegations that would be sufficient to show that the Trustee’s claims do not depend on an extraterritorial application of Bankruptcy Code § 550(a) would be allegations showing that the subsequent transfers he seeks to recover occurred within the United States. The *Espírito Santo Proffer* contains no such allegations.

The *Espírito Santo Proffer* seeks to recover subsequent transfers in the amount of \$11,426,745 that *Espírito Santo* allegedly received from Fairfield Sentry (*Espírito Santo Proffer* ¶ 1) and subsequent transfers in the amount of \$1,723,897 that *Espírito Santo* allegedly received from Fairfield Sigma Limited (“Fairfield Sigma”), a euro-denominated fund and BVI company currently in liquidation in the BVI (*Espírito Santo Proffer* ¶¶ 1, 46-47). The *Espírito Santo Proffer* contains 54 paragraphs, the vast majority of which relate to the Trustee’s new theory that Fairfield Sentry and Fairfield Sigma had their principal operations in the United States, or information disclosed in the Fairfield Sentry and Fairfield Sigma private placement memoranda, or the terms and conditions of the Fairfield Sentry and Fairfield Sigma subscription agreements. Only 15 of the 54 paragraphs even mention *Espírito Santo* (*Espírito Santo Proffer* ¶¶ 1, 4, 5, 8, 9, 11, 13-21). *The Espírito Santo Proffer provides no information about the alleged subsequent transfers from Fairfield Sigma, the euro-denominated fund, and only one paragraph provides any information about the alleged subsequent transfers from*

Fairfield Sentry, the U.S. dollar-denominated fund: “Espírito Santo received the Fairfield Sentry transfers through its agent Euroclear’s bank account at The Bank of New York in New York” (Espírito Santo Proffer ¶ 17).

On the dispositive issue of where the transfers from Fairfield Sentry and Fairfield Sigma occurred, the Espírito Santo Proffer is deliberately silent. The Trustee does not and cannot allege that Fairfield Sigma made any transfers from a bank account in the United States because Fairfield Sigma was a euro-denominated fund. The Trustee also does not and cannot allege that Fairfield Sentry made any transfers from a bank account in the United States because the Trustee knows that Fairfield Sentry’s account was at Citco Bank Nederland NV, Dublin Branch. *See* Trustee’s Main Memorandum, n.88 (“[A]though Fairfield Sentry was organized under the laws of the BVI, none of its investors’ subscriptions or redemptions flowed through the BVI. Investors wired funds to Fairfield’s account at Citco Bank in Ireland . . .”). And, as Judge Rakoff has already ruled, the Trustee’s allegations concerning the use of U.S. accounts (such as the correspondent account of Fairfield Sentry’s bank, Citco Bank Dublin, at HSBC in New York) to process dollar-denominated transfers are not sufficient to satisfy his burden of pleading a domestic transfer. 513 B.R. at 228 n.1.

Simply stated, none of the allegations in the Espírito Santo Proffer, singly or in combination, give rise to a plausible inference that the alleged subsequent transfers from Fairfield Sentry and Fairfield Sigma to Espírito Santo occurred in the United States. The Trustee has made the same or similar allegations in all or nearly all of the 88 proceedings currently before the Court and assigned each allegation to one or more of 19 categories presented in the Trustee’s Chart. The Consolidated Supplemental Reply addresses each of the 19 categories and shows why they are not relevant to the dispositive issue of where the

transfers occurred. Espírito Santo adopts and relies on the arguments set forth in the Consolidated Supplemental Reply and therefore will not separately address the allegations in the Espírito Santo Proffer or the 9 categories the Trustee has checked off in the Chart for Espírito Santo.

Conclusion

Banque Privée Espírito Santo S.A respectfully requests that the Court dismiss the Trustee's Complaint against it with prejudice and without leave to amend. The Complaint should be dismissed because it contains no allegations that any alleged subsequent transfers from Fairfield Sentry to Banque Privée Espírito Santo S.A occurred in the United States. The Trustee's motion for leave to amend should be denied on the ground of futility because the allegations in the Espírito Santo Proffer with respect to "extraterritoriality" do not give rise to a plausible inference that the alleged subsequent transfers from Fairfield Sentry and Fairfield Sigma occurred in the United States.

Dated: New York, New York
September 30, 2015

FLEMMING ZULACK WILLIAMSON
ZAUDERER LLP

/s/ John F. Zulack

John F. Zulack
One Liberty Plaza
New York, New York 10006
Telephone: (212) 412-9500

*Attorneys for Defendant Banque Privée
Espírito Santo S.A*